

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6

7 BRIAN JOEL DEBARR,

8 Plaintiff,

9 v.

10 STEPHAN CLARK, *et al.*,

11 Defendants.  
12

Case No. 3:12-cv-00039-LRH-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

13 This Report and Recommendation is made to the Honorable Larry R. Hicks, Senior  
14 United States District Judge. The action was referred to the undersigned Magistrate Judge  
15 pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

16 Before the court is Defendants Renewed Motion for Summary Judgment Based on  
17 Qualified Immunity. (ECF Nos. 104; exhibits at 105, 106, 107, 125; 116<sup>1</sup>; 124<sup>2</sup>.) Plaintiff filed a  
18 response. (ECF No. 129, 130 (appendix of exhibits).) Defendants filed a reply. (ECF No. 131.)

19 After a thorough review, the court recommends that Defendants' motion be denied.

20 **I. BACKGROUND**

21 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),  
22 who filed this action concerning events that took place while Plaintiff was housed at Lovelock  
23 Correctional Center (LCC) in the Sixth Judicial District Court of the State of Nevada, in and for  
24 the County of Pershing, on December 21, 2011. (ECF No. 1-1.) Defendants removed the action  
25 to federal court on January 20, 2012. (ECF No. 1.)

26 Defendants are Tara Carpenter, Ellie Emmanuel, Don Helling, Jack Palmer, Kirk  
27 Widmar, and Greg Cox. (*See* Screening Order, ECF No. 7.) Defendant Stephen Clark was  
28

1

ECF No. 116 is a notice of supplemental authority in support of Defendants' motion.

2

ECF No. 124 is a notice of the manual filing of two CDs containing audio recordings of disciplinary hearings.

1 dismissed without prejudice pursuant to a stipulation between the parties. (ECF Nos. 102, 103.)<sup>3</sup>

2 In his complaint, Plaintiff alleges that he is a member of the Pagan faith group at LCC  
3 and in January 2009, he and other Pagan faith group members were informed that part of the  
4 land authorized for use by the Pagans at LCC would be flattened in connection with construction  
5 projects on buildings, including housing units 3A and 3B. He claims that the area initially  
6 identified by the LCC administration as being impacted did not include the sacred portions of the  
7 Pagan grounds, so the Pagans made preparations to accommodate the construction project. He  
8 claims that on October 21, 2009, instead of flattening only a portion of the grounds, the entirety  
9 of the grounds behind units 3A and 3B were flattened.

10 After learning of the destruction of the grounds, he contends that he filed multiple  
11 grievances, containing one issue per grievance, as is required under Administrative Regulation  
12 (AR) 740. He subsequently received a notice of charges for abuse of the inmate grievance  
13 process. He was convicted and sentenced to fifteen days in disciplinary segregation. He claims  
14 that he was identified as one of a group of Pagan inmates who submitted multiple grievances  
15 regarding destruction of the grounds and it was recommended that he be transferred to the  
16 allegedly more secure and less desirable High Desert State Prison (HDSP). He was transferred to  
17 HDSP on January 13, 2010, and was ultimately transferred back to LCC in July 2011.

18 On screening, Plaintiff was allowed to proceed with the following claims based on those  
19 facts: (1) retaliation for filing grievances; (2) claims under the First Amendment's Free Exercise  
20 Clause and the Religious Land Use and Institutionalized Persons Act (RLUIPA),  
21 42 U.S.C. § 2000-cc(1); (3) an Equal Protection Clause claim for alleged discrimination against  
22

23  
24 3

25 Even though Clark was dismissed from the action without prejudice, Defendants state in two footnotes that he  
26 nevertheless joins in their motion and reply. (ECF No. 104 at 1, n. 1, ECF No. 131 at 1, n. 1.) Mr. Clark cannot join in  
a motion for summary judgment if he is not a party, and he was dismissed pursuant to stipulation. Defendants intent in  
including Mr. Clark appears to be to preclude Plaintiff from renewing the action against Mr. Clark if the other  
Defendants are found to be entitled to qualified immunity, as they argue that Mr. Clark would similarly be entitled to  
qualified immunity. If Mr. Clark wanted to make the argument of qualified immunity, he should have remained a party.  
As a practical matter, if the court were to find the current defendants are entitled to qualified immunity, it is unlikely  
Plaintiff would reinitiate the action against Mr. Clark.

1 those of the Pagan faith. (ECF No. 7.) The Screening Order did not address the viability of the  
2 State law claims or the federal conspiracy claim brought pursuant to 42 U.S.C. §§ 1985, 1986.

3 On June 10, 2013, Defendants filed their initial motion for summary judgment, arguing  
4 that the disciplinary action taken against Plaintiff and his transfer to HDSP were based on  
5 legitimate penological reasons, and not because of Plaintiff was filing grievances or because of  
6 his Pagan beliefs. (ECF No. 35.) On January 13, 2014, the undersigned recommended that  
7 insofar as Plaintiff's response to the motion contained a request under what is now Federal Rule  
8 of Civil Procedure 56(d), there were insufficient grounds for allowing Plaintiff to conduct further  
9 discovery. (ECF No. 48.) The undersigned further recommended that Defendants motion be  
10 granted. (ECF No. 48.) On March 7, 2014, District Judge Larry R. Hicks adopted and accepted  
11 the report and recommendation. (ECF No. 53, 64.<sup>4</sup>) Plaintiff appealed the order on March 14,  
12 2014. (ECF Nos. 54, 65.)

13 On March 2, 2016, the Ninth Circuit Court of Appeals issued a memorandum reversing  
14 and remanding the grant of summary judgment in favor of Defendants.<sup>5</sup> The appellate court  
15 concluded that the district court erred "by concluding that the evidence presented no genuine  
16 issue of material fact as to whether Plaintiffs abused the prison grievance process." (ECF No. 70  
17 at 3.) The Ninth Circuit found that the "evidence, when viewed in the light most favorable to  
18 Plaintiffs, shows that they had engaged in the prison's informal resolution procedure before  
19 filing their grievances, that their grievances were not frivolous, vexatious or duplicative, and that  
20 the Defendants failed to follow their own mandated procedures in punishing Plaintiffs." (*Id.*)  
21 While Defendants argued that AR 740 forbids the filing of duplicative grievances, the Ninth  
22

---

23 4

24 In this order, Judge Hicks determined that the state law claims should not be remanded to state court, but  
25 failed for the same reasons as Plaintiff's federal law claims.

26 5

The Ninth Circuit consolidated this case on appeal with *Gadsden v. Carpenter*, 3:12-cv-00098-RCJ-VPC (now 3:12-cv-00098-MMD-VPC). While Plaintiff's counsel indicated at a post-remand status conference that he would likely seek an order consolidating the cases at the district court level (*see* minutes at ECF No. 84), a motion to consolidate was never filed. It should be noted that in *Gadsden*, District Judge Du denied the defendants' motion to file a renewed motion for summary judgment based on qualified immunity because they sought to file the motion after the expiration of the dispositive motion deadline and did not establish good cause to justify an order allowing the untimely filing of the motion. (*See* ECF No. 131 in 3:12-cv-00098-MMD-VPC.) Defendants' motion in this case was timely filed.

1 Circuit pointed out that “AR 740 only limits the number of ‘unfounded frivolous or vexatious  
2 grievances,’ a disputed issue in this case.” (*Id.*) The Ninth Circuit also concluded that the district  
3 court abused its discretion in denying the request for a continuance of summary judgment  
4 pending further discovery under Federal Rule of Civil Procedure 56(d), and stated that on  
5 remand Plaintiffs should be allowed to pursue discovery. (*Id.* at 4.)

6 On remand, consistent with the Ninth Circuit’s order, the undersigned directed the parties  
7 to meet and confer concerning what discovery needed to be undertaken, and subsequently  
8 reopened discovery and modified the scheduling order. (*See* ECF Nos. 84, 88.)

9 On December 12, 2016, Defendants filed their Renewed Motion for Summary Judgment  
10 Based on Qualified Immunity. Defendants argue that they did not violate Plaintiff’s  
11 constitutional rights, and even when considered in the light most favorable to Plaintiff, the facts  
12 show no violation of a constitutional right clearly established in law at the time the conduct  
13 occurred. Plaintiff, on the other hand, argues that Defendants are merely attempting to rehash  
14 their motion for summary judgment on the merits, when the Ninth Circuit already determined  
15 there was a genuine dispute of material fact precluding summary judgment in Defendants’ favor.  
16 He further argues that Defendants were on clear notice that their conduct violated Plaintiff’s  
17 constitutional rights.

## 18 II. DISCUSSION

### 19 **A. Qualified Immunity**

20 “‘In determining whether an officer is entitled to qualified immunity, we consider  
21 (1) whether there has been a violation of a constitutional right; and (2) whether that right was  
22 clearly established at the time of the officer’s alleged misconduct.’” *Ames v. King County,*  
23 *Washington*, 846 F.3d 340, 347 (9th Cir. 2017) (quoting *Lal v. California*, 746 F.3d 1112, 1116  
24 (9th Cir. 2014)). The court may use its discretion to determine which of the prongs to address  
25 first. *Id.*

26 “Qualified immunity attaches when an official’s conduct ‘does not violate clearly  
established statutory or constitutional rights of which a reasonable person would have known.’”  
*White v. Pauly*, 137 S.Ct. 548, 551 (2017) (quoting *Mullenix v. Luna*, 136 S.Ct. at 308). A case

1 directly on point is not required for a right to be clearly established, but ““existing precedent  
2 must have placed the statutory or constitutional question beyond debate.”” *Id.* “In other words,  
3 immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Id.*

4 “‘[C]learly established law’ should not be defined ‘at a high level of generality.’” *Id.* at  
5 552 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). “[T]he clearly established law must  
6 be ‘particularized’ to the facts of the case.” *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640  
7 (1987)). “Otherwise, ‘[p]laintiffs would be able to convert the rule of qualified immunity ... into  
8 a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’”  
9 *Id.* (quoting *Anderson*, 483 U.S. at 639).

## 10 **B. Was There a Violation of a Constitutional Right?**

11 First, the court will address whether there has been a violation of a constitutional right.

12 Preliminarily, Plaintiff claims that Defendants’ motion simply rehashes its earlier motion  
13 for summary judgment on the merits, the granting of which was reversed by the Ninth Circuit. It  
14 is true that many of Defendants’ arguments are similar to those raised in the original motion, but  
15 in arguing they are entitled to qualified immunity, Defendants are permitted to argue that there  
16 was no violation of a constitutional right. *See Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir.  
17 2002) (explaining that the rights-violation prong of the qualified immunity analysis “mirrors the  
18 substantive summary judgment decision on the merits”). Therefore, the court does not find  
19 Defendants’ motion should be denied on this basis.

20 As will be discussed in detail below, even after discovery was reopened pursuant to the  
21 Ninth Circuit’s direction, factual disputes still remain concerning whether there was a violation  
22 of Plaintiff’s constitutional rights, and viewing the facts in the light most favorable to Plaintiff, a  
23 reasonable fact-finder could conclude his constitutional rights were violated. *See Chappell v.*  
24 *Mandeville*, 706 F.3d 1052, 1057 (9th Cir. 2013) (citations omitted) (when the court conducts a  
25 qualified immunity analysis, it must view the facts in the light most favorable to the plaintiff).  
26

Preliminarily, the following general facts are undisputed: during the relevant time period,  
Plaintiff was an inmate housed in LCC’s protective custody (PC) unit, and designated his faith  
group as Pagan. The Pagan inmates utilized an area outside the buildings that housed the PC

1 inmates for worship. At some point in 2009, the Pagans were informed that the prison would  
2 need to do some work to the exterior of the housing units adjacent to the Pagan grounds.

3 On October 20, 2009, the exterior work was performed and resulted in the flattening of  
4 the Pagan grounds.

5 After they observed the flattening of the grounds, Plaintiff and fourteen other Pagan  
6 inmates each submitted twenty-one grievances about various issues concerning the PC Pagan  
7 inmates. Emmanuel consulted with Palmer, and prepared a memorandum for Helling,  
8 recommending that the inmates be served with a notice of charges for abuse of the prison  
9 grievance process. Helling agreed with the recommendation and the inmates, including Plaintiff,  
10 were served with the notice of charges. A disciplinary hearing was held with Widmar serving as  
11 the assigned disciplinary hearing officer. Plaintiff pled not guilty to the charge. Plaintiff gave a  
12 statement explaining that his intent in filing the grievances in that manner was to exhaust his  
13 administrative remedies prior to filing a lawsuit. He was ultimately convicted of the charge and  
14 sentenced to fifteen days in disciplinary segregation. He was also transferred to HDSP.

### 15 **1. Retaliation**

16 “Section 1983 provides a cause of action for prison inmates whose constitutionally  
17 protected activity has resulted in retaliatory action by prison officials.” *Jones v. Williams*, 791  
18 F.3d 1023, 1035 (9th Cir. 2015). Such a claim consists of the following elements: (1) an  
19 assertion that a state actor took some adverse action against an inmate; (2) because of; (3) that  
20 prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First  
21 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

22 *Jones*, 791 F.3d at 1035 (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.  
23 2005)). “The First Amendment guarantees a prisoner a right to seek redress of grievances from  
24 prison authorities as well as a right of meaningful access to the courts.” *Id.* (citation omitted).

25 An inmate must submit evidence, either direct or circumstantial, to establish a link  
26 between the exercise of constitutional rights and the allegedly retaliatory action. *Pratt v.*  
*Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995). The plaintiff “need only ‘put forth evidence of  
retaliatory motive, that, taken in the light most favorable to him, presents a genuine issue of

1 material fact as to [the defendant's] intent[.]” *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir.  
2 2009) (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003)). Restated, in order to raise a  
3 triable issue as to motive, the plaintiff must offer “either direct evidence of retaliatory motive or  
4 at least one of three general types of circumstantial evidence [of that motive].” *McCollum v. Ca.*  
5 *Dep’t of Corr. and Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011) (citation and quotation marks  
6 omitted). Circumstantial evidence may include: “(1) proximity in time between protected  
7 [activity] and the alleged retaliation; (2) [that] the [defendant] expressed opposition to the  
8 speech; [or] (3) other evidence that the reasons proffered by [the defendant] for the adverse ...  
9 action were false and pretextual.” *Id.* (internal citation and quotation marks omitted).

10 Defendants do not contest that adverse action was taken against Plaintiff. Nor do they  
11 make an argument concerning the chilling of Plaintiff’s First Amendment rights. Instead, they  
12 argue that Plaintiff cannot establish he was retaliated against when he was subject to disciplinary  
13 sanctions following the grievance incident because he cannot demonstrate he was punished  
14 because he engaging in protected activity. They maintain that he was disciplined for conspiring  
15 with other inmates in an organized, group protest. In addition, they contend that Plaintiff cannot  
16 establish that Defendants’ conduct did not reasonably advance the legitimate correctional goals  
17 of safety and security of the institution when faced with this coordinated effort among the  
18 fourteen inmates. Plaintiff, on the other hand, argues that the evidence reveals that he was  
19 punished not for conspiring to create an organized group protest, but for filing grievances.

20 Insofar as Defendants argue that Plaintiff was not punished for engaging in First  
21 Amendment activity, but for conspiring with other inmates in an organized group protest, they  
22 contend that Plaintiff admits that NDOC prohibits the filing of a petition.

23 The court notes, however, that Plaintiff was not charged with filing a petition, but with  
24 abuse of the grievance process. While Plaintiff admits that he knew inmates were not allowed to  
25 file a petition, he went on to testify that is not what he and the other inmates were doing. (Pl.  
26 Decl., ECF No. 129 at ¶¶ 13, 14.) He insists they were following the rules by filing one issue per  
grievance so they could exhaust their administrative remedies before filing a lawsuit. (See Pl.’s  
Depo., ECF No. 105 at 19, pp. 60:8-12, 60:21-25; Pl.’s Decl., ECF No. 129 at 19 ¶ 14.) Plaintiff

1 explains that they did not want to have an issue with an inmate who was part of the group not  
2 being able to pursue a claim in the lawsuit for failure to exhaust administrative remedies;  
3 therefore, they exchanged a document between themselves where each person wrote out the  
4 issues they thought should be included (in the lawsuit), and using that document agreed on  
5 twenty-one issues for which each inmate needed to file a grievance. (Pl.'s Decl., ECF No. 129 at  
6 19 ¶ 15.) Plaintiff states that the issues were mainly about the treatment of the PC Pagan inmates  
7 that had been raised informally previously with the chaplain and caseworkers, and the inmates  
8 doubted the issues would be resolved through the prison grievance process. (*Id.*)

9 Defendants rely on *May v. Libby*, 256 Fed.Appx. 825 (7th Cir. 2007) and *Peck v. Nevin*,  
10 2:13-cv-0782-GMN-CWH, 2014 WL 4829621 (D. Nev. Sept. 29, 2014) to support their  
11 argument that inmates may be punished for this sort of conduct.

12 Preliminarily, the court is not bound by an unpublished Seventh Circuit decision. Insofar  
13 as it may serve as persuasive authority, *May* is distinguishable from this case. *May* involved the  
14 internal affairs department of the prison receiving ten grievances about prison conditions that  
15 purported to be from ten different inmates, but were in the same handwriting and nearly identical  
16 in content, and each asked that May act as their representative. *May*, 256 Fed.Appx. at 827. The  
17 prison interpreted the grievances to be a petition, in violation of the prison's regulations. *Id.*  
18 Prison officials searched May's cell, and confiscated the grievance form and removed legal  
19 documents. *Id.* May alleged that confiscating the grievance form was done in retaliation for  
20 using the grievance process. *Id.* The district court granted the defendants' motion for judgment  
21 as a matter of law at trial, finding that the search of the cell and confiscation of the grievance  
22 form was reasonably related to penological interests. *Id.* at 827-28. The Seventh Circuit  
23 concluded that the *undisputed* evidence that the documents were in the same handwriting,  
24 worded identically, and designated May as the representative, supported the defendants'  
25 explanation that the cell was searched not because May filed grievances concerning prison  
26 conditions but because he circulated a petition. *Id.* The court stated that "[b]anning petitions to  
maintain control over group activity by prisoners is a reasonable response to a legitimate  
penological concern." *Id.* (citations omitted).



1 Here, the grievances were not in the same handwriting, and while they had the same  
2 content, none of the inmates asked for Plaintiff to be their representative. In addition, there was  
3 no finding by prison officials here that the grievances constituted a petition. Instead, Emmanuel  
4 wrote a memorandum to Helling that described the action as intending to harass and an abuse of  
5 the prison grievance process. The memorandum does not make reference to a petition. She  
6 recommended that a notice of charges be issued for abuse of the grievance procedure, not for  
7 filing a petition, and Helling accepted this recommendation. Plaintiff was charged with abuse of  
8 the prison grievance procedure, not for filing a petition. Moreover, the appellate court in *May*  
9 found that May had not submitted evidence to dispute the evidence proffered by the defendants  
10 that their action was in response to a legitimate penological concern. Here, Plaintiff has  
11 submitted evidence to dispute Defendants' claim that their action was in response to the safety  
12 and security concerns posed by the coordinated effort of Plaintiff and the fourteen other inmates  
13 in filing the grievances.

14 *Peck* is also distinguishable. In *Peck*, the plaintiff alleged he was retaliated against for  
15 filing a grievance against the law library supervisor at HDSP. *Peck*, 2014 WL 4829621, at \* 1. In  
16 that case, a cell search was conducted and nine boxes containing legal files were removed from  
17 Peck's cell and not returned until the next day. *Id.* In the motion to dismiss, the defendants  
18 asserted that the cell was searched as part of an effort to prevent a security brief after they had  
19 received identical grievances from ten inmates, including Peck. *Id.* at \* 3. In the complaint, Peck  
20 claimed this was just a ruse. *Id.* The court found that it was "undisputed" that a valid security  
21 risk existed in Peck's unit at the time of the search, regardless of whether Peck was involved in  
22 the submission of the set of grievances. *Id.* As a result, the court found Plaintiff did not  
23 adequately allege that the action taken did not reasonably advance a legitimate correctional goal.

24 *Peck* was decided in the context of a motion to dismiss, where apparently the facts were  
25 undisputed. Here, there are competing versions of the facts on summary judgment specifically  
26 concerning whether Plaintiff was retaliated against because of his protected activity and whether  
the conduct advanced a legitimate correctional goal.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
Next, in support of his claim that he was punished for filing grievances, Plaintiff states that he was aware of AR 740's prohibition on the filing of "vexatious grievances"—those submitted "to agitate, harass or irritate by petty provocations" and "not designed to lead to any practical result." (Pl.'s Decl., ECF No. 130 at 9 ¶ 17.) In light of this, Plaintiff submitted kites to Mr. Harkreader and Ms. Emmanuel, informing them that he was filing multiple grievances concerning his faith, and that he did not intend the grievances to be malicious or vexatious, but was filing them in this manner to comply with AR 740's requirement that each grievance of an issue be filed separately, and to exhaust administrative remedies before filing a lawsuit. (*Id.* ¶ 18; ECF No. 130 at 21-22.) Plaintiff noted in the kites that he had to go through each stage of the grievance process to exhaust his administrative remedies unless the prison would agree to waive any claims against exhaustion. (*Id.*)

13  
14  
15  
16  
17  
18  
While Ms. Emmanuel and others testified in connection with this litigation that this was a manipulative effort to try to justify the abusive grievance process, taking the facts in the light most favorable to Plaintiff, his testimony on this issue creates a dispute of fact as to whether Plaintiff was punished for filing grievances in order to exhaust his administrative remedies or for abusing the grievance process by harassing staff with a coordinated filing of hundreds of grievances.

19  
20  
21  
22  
23  
24  
25  
26  
As evidence of the harassing nature of the filing of the grievances, Defendants point to testimony that there was a group of inmates laughing when Caseworker Belanger picked up the stack of grievances. In response, Plaintiff indicates that he was not one of those inmates, and there is no evidence that any of the Pagan inmates involved in filing the grievances were present. (Pl. Decl., ECF No. 130 at 14 ¶ 31.) He also asserts that there is no actual evidence that Plaintiff or any of the other inmates involved in filing the grievances informed the group of inmates who were purportedly laughing about the submission of the grievances. Therefore, there is a dispute of fact here as well.

Defendants also rely on the fact that the grievances pertained to issues that occurred much earlier and should have been resolved through kites or religious accommodation processes as evidence of Plaintiff's and the other inmates' improper motive in filing the grievances.

1 Plaintiff, on the other hand, asserts that the issues raised in the grievances (with the exception of  
2 destruction of the Pagan grounds) had been previously addressed in kites or through the religious  
3 accommodation process, including discussions with the chaplain and caseworkers, and written  
4 requests to the religious accommodations committee. (Pl. Decl., ECF No. 130 at 14 ¶ 32.)  
5 Plaintiff also points to a kite he sent to Director Skolnik requesting assistance in resolving an  
6 issue regarding the treatment of Pagan inmates at LCC, to which he received a response advising  
7 him to utilize the prison grievance procedure to resolve issues, and if unsuccessful, for the  
8 exhaustion of administrative remedies as a predicate to litigation. (Pl. Decl., ECF No. 130 at 11  
9 ¶ 21.)

10 While Defendants argue that Plaintiff was not disciplined because he filed grievances,  
11 but for the manner in which the grievances were filed which constituted an abuse of the  
12 grievance process, Plaintiff points out that AR 740 provides that an inmate who is found to abuse  
13 the prison grievance process is to be given NDOC Form 3098 as a sort of warning or safe harbor  
14 prior to being disciplined, and it is undisputed he never received this form. (Pl.'s Decl., ECF No.  
15 129 at 10 ¶¶ 19, 20; ECF No. 35-28 at 10; ECF No. 104 at 9.) Defendants contend that under  
16 AR 707, the failure to follow a regulation does not mean an inmate may not still be given a  
17 notice of charges for a disciplinary regulation. In addition, Emmanuel testified that the improper  
18 grievance form was not generally used at LCC because Warden LeGrand preferred for  
19 grievances to be answered. (Emmanuel Depo., ECF No. 105 at 145, depo. pp. 52:15-20, 53:1,  
20 76:1-18, 79:13-16.) Plaintiff disputes this was the case, indicating that he received the Form  
21 3098 for unrelated grievances on October 21, 2009 and December 21, 2009, with the latter being  
22 sent to him by Ms. Emmanuel. (Pl. Decl., ECF No. 130 at 10 ¶ 20; ECF No. 130 at 24-25.)

23 Defendants then argue that the evidence establishes that the inmates' actions resulted in  
24 harassing the staff at LCC, and given the coordinated effort of the inmates, NDOC was rightfully  
25 concerned about safety and security of the institution. Defendants maintain that the filing of  
26 hundreds of grievances at once overwhelmed staff, and was evidence of a concerted effort  
among these inmates which had the potential to develop into a security issue.

1 Again, Plaintiff presents evidence that he and the other Pagan inmates involved informed  
2 Ms. Emmanuel and others that they did not intend to harass or be vexatious, but were trying to  
3 exhaust their administrative remedies before filing suit, which raises a factual dispute as to  
4 whether the action taken against Plaintiff was in response to a legitimate correctional goal of  
5 safety and security or to punish for filing grievances.

6 Plaintiff also points out that Widmar told him he would not be able to present witnesses  
7 at his disciplinary hearing. Instead, Widmar said he could pose questions to defendant Helling,  
8 which he did, but received no responses. Instead, he was merely given a copy of  
9 Ms. Emmanuel's November 3, 2009 memorandum to Helling, which recommended that the  
10 inmates be served with a notice of charges for abuse of the prison grievance process. (Pl. Decl.,  
11 ECF No. 130 at 12-13 ¶¶ 25, 26.) Plaintiff maintains that this memorandum did not answer the  
12 questions he had posed to Helling. (Pl. Decl., ECF No. 130 at 13 ¶ 27.) Plaintiff also takes issue  
13 with some of the statements made in Ms. Emmanuel's memorandum. (Pl. Decl., ECF No. 130 at  
14 13-14 ¶¶ 27-33.) This is additional circumstantial evidence sufficient to create a disputed issue  
15 of fact regarding whether Defendants punished Plaintiff for filing grievances or related to  
16 legitimate safety concerns.

17 Plaintiff further contends that he was sentenced to punishment for abuse of the grievance  
18 procedure without a basis for such punishment in the governing regulation, AR 740.

19 Plaintiff claims that on the morning of his disciplinary hearing, December 15, 2009,  
20 prison staff told him, before the hearing had even taken place, that he would be sent to  
21 disciplinary segregation after the hearing. (Pl. Decl., ECF No. 130 at 15 ¶ 34.) When he arrived  
22 for the hearing, security staff were already there waiting to take him to disciplinary segregation.  
23 (*Id.*) In addition, he advised Widmar that his intent in filing the grievances was not to harass, but  
24 to exhaust his administrative remedies before filing a lawsuit, and that he had advised  
25 Ms. Emmanuel and Mr. Harkreader of this. (Pl. Decl., ECF No. 130 at 15 ¶ 36.) He also advised  
26 Widmar of his position that if prison officials thought he was abusing the grievance process by  
filing the grievances in that manner, that he should have been provided with Form 3098, but he  
never received that form. (Pl. Decl., ECF No. 130 at 15 ¶ 36.) Plaintiff contends that Widmar

1 told him he was issued the notice of charges not for filing the grievances, but because they were  
2 filed as a group, and that Form 3098 is only required when an individual files a grievance  
3 violating AR 740, not when inmates file grievances as a group. Plaintiff points out that Widmar  
4 but did not refer to any provision in AR 740 that supported his position that Plaintiff did not  
5 have to be provided with Form 3098 when he was being served with a notice of charges for  
6 abuse of the grievance process. (Pl. Decl., ECF No. 130 at 15-16 ¶ 37.) Despite Plaintiff's  
7 explanation, Widmar found Plaintiff guilty and sentenced him to fifteen days of disciplinary  
8 segregation. (Pl. Decl., ECF No. 130 at 16 ¶ 38.)

9 Defendants maintain that Plaintiff's transfer was justified because of the safety and  
10 security concerns associated with the Pagan inmates' coordinated effort in filing the grievances.  
11 They assert that the filing of hundreds of grievances in a short period of time overwhelmed staff  
12 and took them away from their other duties. Plaintiff points out that if the grievances were  
13 indeed identical, a single response could have been made to one set of grievances and that  
14 response could have been copied and sent to all of the inmates. Alternatively, if the prison had  
15 issued Form 3098 to the inmates for abuse of the prison grievance procedure, that could have  
16 stopped short the influx of grievances as well as the need to provide a substantive response.  
17 Finally, Plaintiff states that the prison could have adopted his suggestion to waive the exhaustion  
18 defense, thereby obviating the need of the inmates to continue through the grievance process.  
19 These statements all serve as evidence to create a genuine dispute of material fact as to why  
20 Plaintiff was disciplined.

21 Plaintiff raises the fact that one of the fifteen Pagan inmates involved was not sentenced  
22 to disciplinary segregation. (ECF No. 129 at 15.) That inmate did not deny that he filed the  
23 grievances, but advised Widmar that he would withdraw them, stating he no longer wanted  
24 anything to do with it, and Widmar dismissed the charges. (*Id.*; ECF No. 130 at 31-35.) Plaintiff  
25 argues that this is evidence that the inmates were being punished for filing grievances, since this  
26 inmate admitted to filing the grievances, but the charges were dismissed when he agreed to  
withdraw them.

1 Plaintiff also claims that he was retaliated against when he was transferred to HDSP. At  
2 the end of Plaintiff's fifteen days in disciplinary segregation, he asserts that he was taken to a  
3 classification hearing to determine if he could return to his prior unit. (Pl. Decl., ECF No. 130 at  
4 16 ¶ 40.) He says that at that time it was determined he was not a safety and security threat, and  
5 was approved for transfer back to his unit. (Pl. Decl., ECF No. 130 at 16 ¶ 40; ECF No. 40 at  
6 82.) That same day, case notes were entered stating: "Inmate is part of a group of P/S inmates  
7 who engaged in disruptive behavior at LCC and is completing DS time for this. For the  
8 continued safety and security of LCC's P/S units as well as these inmates adjustment, it is best to  
9 split up the group. This is not an adverse classification, they are going to the same custody level,  
10 PS, at HDSP." (ECF No. 40 at 82.) Plaintiff asserts that the foregoing is evidence that he was  
11 transferred for filing grievances. While the notes state that it was not an adverse classification,  
12 Plaintiff retorts that he feared being transferred to HDSP because he had past violent incidents  
13 with Aryan Warriors, a known prison gang with a substantial presence at HDSP. (Pl. Decl.,  
14 ECF No. 130 at 17 ¶ 43.)

15 Ms. Carpenter testified that she participated in making the recommendation that Plaintiff  
16 could be safely transferred to HDSP because he would be in protective segregation. Plaintiff  
17 states, however, that general population inmates, which include gang members, do have  
18 occasional access to protective segregation inmates. (Pl. Decl., ECF No. 130 at 18 ¶ 44.) He  
19 states that they became aware of his arrival to HDSP and threatened him several times, causing  
20 him to live in fear while he resided at HDSP. (Pl. Decl., ECF No. 130 at 18 ¶ 44.)

21 This evidence reveals additional disputed facts concerning whether Plaintiff's transfer to  
22 HDSP was retaliatory.

23 While Defendants claim that the coordinated effort of fifteen inmates filing twenty-one  
24 grievances presented a safety risk because their conduct could potentially escalate to violence,  
25 Plaintiff points out that there was no actual evidence of that happening. Viewed in the light most  
26 favorable to Plaintiff, he and the other inmates were upset about the flattening of the Pagan  
grounds, but acted civilly and according to regulations when they raised their concerns through  
the grievance procedure in order to exhaust their administrative remedies to file a lawsuit.

1 In sum, Plaintiff has presented evidence that establishes a genuine dispute of material  
2 fact as to whether he was punished for filing grievances, and whether Defendants' conduct was  
3 reasonably related to legitimate correctional goals of safety. Therefore, Defendants' motion  
4 should be denied insofar as they assert they are entitled to qualified immunity on the retaliation  
5 claim because no constitutional violation occurred.<sup>6</sup>

## 6 **2. First Amendment Free Exercise/RLUIPA**

### 7 **a. The Free Exercise Clause**

8 "The First Amendment, applicable to state action by incorporation through the  
9 Fourteenth Amendment, ... prohibits government from making a law prohibiting the free  
10 exercise [of religion]." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir.  
11 2013) (citations and quotation marks omitted, alteration original). "Inmates retain the protections  
12 afforded by the First Amendment, 'including its directive that no law shall prohibit the free  
13 exercise of religion.'" *Shakur v. Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008) (quoting *O'Lone*  
14 *v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)).

15 To implicate the Free Exercise Clause, a prisoner must establish his belief is both  
16 sincerely held and rooted in religious belief. *See Shakur*, 514 F.3d at 884-85. The inquiry is not  
17 whether a belief is a central tenet of the inmate's religion. *See id.* at 885. Then, "[a] person  
18 asserting a free exercise claim must show that the government action in question substantially  
19 burdens the person's practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir.  
20 2015) (citation omitted). "A substantial burden ... place[s] more than an inconvenience on  
21 religious exercise; it must have tendency to coerce individuals into acting contrary to their  
22 religious beliefs or exert substantial pressure on an adherent to modify his behavior and to  
23

---

24 6

25 Defendants' argue in their reply brief that Plaintiff has not raised a triable issue because his opposition relies  
26 on his own self-serving declaration. This argument is unavailing. The Ninth Circuit has acknowledged "that declarations  
are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or  
her position." *See Nigro v. Sears, Roebuck and Co.*, 784 F.3d 495, 497 (9th Cir. 2015) (citing *S.E.C. v. Phan*, 500 F.3d  
895, 909 (9th Cir. 2007) (holding that district court erred in disregarding declarations as "uncorroborated and self-  
serving"). "Although the source of the evidence may have some bearing on its credibility, and thus on the weight it may  
be given by a trier of fact, the district court may not disregard a piece of evidence at the summary judgment stage solely  
based on its self-serving nature." *Id.*

1 violate his beliefs.” *Id.* (quoting *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir. 2013)).

2 “The right to exercise religious practices and beliefs does not terminate at the prison  
3 door. The free exercise right, however, is necessarily limited by the fact of incarceration, and  
4 may be curtailed in order to achieve legitimate correctional goals or to maintain prison security.”  
5 *McElyea v. Babbitt*, 833 F.3d 196, 197 (9th Cir. 1987) (per curiam); *see also O’Lone*, 482 U.S. at  
6 348; *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Hartmann*, 707 F.3d at 1122; *Shakur*, 515 F.3d at  
7 883-84. The challenged conduct is “valid if it is reasonably related to legitimate penological  
8 interests.” *O’Lone*, 482 U.S. at 348 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

9 In analyzing the legitimacy of regulation of a prisoner’s religious expression, the court is  
10 instructed to utilize the reasonableness factors set forth in *Turner v. Safley*. *O’Lone*, 482 U.S. at  
11 349. The *Turner* factors are: (1) “there must be a ‘valid, rational connection’ between the prison  
12 regulation and the legitimate governmental interest put forward to justify it”; (2) “whether there  
13 are alternative means of exercising the right that remain open to prison inmates”; (3) “the impact  
14 accommodation of the asserted constitutional right will have on guards and other inmates, and on  
15 the allocation of prison resources generally”; (4) the “absence of ready alternatives” and the  
16 “existence of obvious, easy alternatives.” *Turner*, 482 U.S. at 89-91.

#### 17 **b. RLUIPA**

18 Section 3 of RLUIPA provides:

19 No government shall impose a substantial burden on the religious  
20 exercise of a person residing in or confined to an institution ...  
21 even if the burden results from a rule of general applicability,  
22 unless the government demonstrates that imposition of the burden  
23 on that person -- (1) is in furtherance of a compelling  
governmental interest; and (2) is the least restrictive means of  
furthering that compelling governmental interest.

24 42 U.S.C. § 2000cc-1(a). “The Supreme Court has recognized RLUIPA as ... [a] ‘congressional  
25 effort[ ] to accord religious exercise heightened protection from government-imposed  
26 burdens[.]’” *Greene v. Solano County Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (quoting *Cutter v.*  
*Wilkinson*, 544 U.S. 709, 714 (2005)).

///



1 “Under RLUIPA, the challenging party bears the initial burden of proving that his  
2 religious exercise is grounded in a sincerely held religious belief ..., and that the government’s  
3 action substantially burdens his religious exercise.” *Holt v. Hobbs*, 135 S.Ct. 853, 857 (2015)  
4 (citations omitted). “Religious exercise” under RLUIPA is “any exercise of religion, whether or  
5 not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). Under  
6 RLUIPA, the concept of religious exercise “shall be construed in favor of a broad protection of  
7 religious exercise, to the maximum extent permitted by the terms of this chapter and the  
8 Constitution.”

9 **c. Analysis**

10 Defendants do not argue that Plaintiff’s claim fails for lack of a sincerely held religious  
11 belief for purposes of the Free Exercise Clause or RLUIPA. Instead, they argue: (1) Plaintiff  
12 failed to provide evidence as to how NDOC’s actions of charging him with abusing the  
13 grievance process, sentencing him to disciplinary segregation or transferring him to HDSP  
14 created a substantial burden to his religious practices; and (2) prison security is a compelling  
15 government interest. (ECF No. 104 at 23-24.) In support of their argument they state that  
16 Plaintiff conceded he can exercise his religion indoors and has access to the chapel.

17 Plaintiff contends that because he was kept in disciplinary segregation for fifteen days  
18 starting December 16, 2009, he was unable to participate in any ceremonies for the Solstice  
19 holiday celebrated by Pagans. (Pl. Decl., ECF No. 130 at 16 ¶ 39.) In addition, Plaintiff asserts  
20 that while he was at HDSP, he was denied access to any outdoor area for the practice of his  
21 pagan faith. (Pl. Decl., ECF No. 130 at 18 ¶ 45.)

22 This evidence is sufficient to raise a triable issue as to whether Plaintiff’s practice of  
23 religion was substantially burdened under the Free Exercise Clause and RLUIPA.

24 Insofar as Defendants argue that their conduct furthered a compelling government  
25 interest, Defendants generally refer to safety and security, presumably referencing the safety and  
26 security arguments they made with respect to the retaliation claim, but the court has found that  
there are factual disputes concerning whether their action was supported by a legitimate  
correctional goal. Moreover, they do not address whether their conduct was the least restrictive

1 means of furthering a compelling government interest under RLUIPA. “‘The least-restrictive-  
2 means standard is exceptionally demanding,’ and it requires the government to ‘sho[w] that it  
3 lacks other means of achieving its desired goal without imposing a substantial burden on the  
4 exercise of religion by the objecting part[y.]” *Holt*, 135 S.Ct. at 864 (quoting *Hobby Lobby*, 134  
5 S.Ct. at 2780). Plaintiff has provided evidence that Defendants could have issued a Form 3098,  
6 responded to the grievances “en masse” or waived the exhaustion requirement in order to quell  
7 what they thought was a coordinated effort resulting in a security threat. This is sufficient to  
8 defeat summary judgment on this issue.

9 Therefore, insofar as Defendants argue there was no constitutional violation for qualified  
10 immunity purposes as to Plaintiff’s free exercise and RLUIPA claims, their motion should be  
11 denied.

### 12 **3. Equal Protection**

13 “The Equal Protection Clause requires the State to treat all similarly situated people  
14 equally.” *Hartmann*, 707 F.3d at 1123 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.  
15 432, 439 (1985)). “This does not mean, however, that all prisoners must receive identical  
16 treatment and resources.” *Hartmann*, 707 F.3d at 1123 (citations omitted). The plaintiff must  
17 establish that “the defendants acted with an intent or purpose to discriminate against [him] based  
18 upon membership in a protected class.” *Id.* (citations and internal quotation marks omitted).

19 Defendants argue that Plaintiff has no evidence that he was singled out because of his  
20 religion. (ECF No. 104 at 25-26.) Instead, they contend that he was disciplined and transferred  
21 because for abusing the grievance process.

22 As with the other claims, Plaintiff has produced evidence sufficient to raise a genuine  
23 dispute of material fact as to whether he was disciplined and transferred because of his religion.  
24 Plaintiff states in his declaration that after the destruction of the Pagan grounds, he and the other  
25 inmates were upset and tried to discuss the matter with staff, but were essentially told that  
26 nothing could be done. (Pl. Decl., ECF No. 130 at 7 ¶¶ 9-11.) This led to the inmates deciding to  
file a lawsuit and initiating the filing of grievances to exhaust their administrative remedies  
concerning what they believed to be unfair treatment of Pagan inmates at LCC. (Pl. Decl.,

1 ECF No. 130 at 8 ¶ 13.) He contends that Ms. Emmanuel immediately responded by preparing a  
2 memorandum to Mr. Helling, which Plaintiff maintains did not accurately reflect the situation  
3 and left out critical details. (Pl. Decl., ECF No. 130 at 13-14 ¶¶ 27-33.) In addition, Plaintiff  
4 points to the fact that he did not receive Form 3098 when Emmanuel herself issued the form to  
5 Plaintiff in other instances, as well as the disciplinary hearing, where he was not allowed to call  
6 witnesses, his questions to Mr. Helling were not answered, and he believes that his guilt was  
7 determined before the hearing. (Pl. Decl., ECF No. 130 at 10 ¶¶ 20, 34, 35.) Finally, he points  
8 out that he was transferred to HDSP despite knowledge that there was a gang hostile to him  
9 there. (Pl. Decl., ECF No. 130 at 18 ¶ 44.) While Ms. Carpenter testified she did not believe  
10 Plaintiff would be in danger because he would be in protective segregation at HDSP, Plaintiff  
11 maintains that in reality general population inmates do have occasion access to protective  
12 segregation inmates. (*Id.*)

13 These are disputed facts, and viewed in the light most favorable to Plaintiff, a fact-finder  
14 could determine that Plaintiff was treated differently because of his Pagan faith. As a result,  
15 insofar as Defendants argue they are entitled to qualified immunity because there was no equal  
16 protection violation, their motion should be denied.

### 17 **C. Were Plaintiff's Constitutional Rights Clearly Established?**

18 Defendants argue that even if there is a factual question as to whether constitutional  
19 violations occurred (as the court has concluded here), they are still entitled to qualified immunity  
20 because the constitutional violations of which Plaintiff complained were not clearly established  
21 in 2009. They claim that there was no case law in existence in 2009 that would have put them on  
22 notice that their actions violated the Constitution. Plaintiff, on the other hand, argues that the law  
23 was sufficiently clear to put Defendants on notice that they were violating his rights.

24 Defendants supplemented their motion with reference to a recent Supreme Court case,  
25 *White v. Pauly*, 137 S.Ct. 548 (2017), which addressed the qualified immunity defense in the  
26 context of a Fourth Amendment excessive force claim. (ECF No. 116.)

*White* reaffirmed that “[q]ualified immunity attaches when an official’s conduct ‘does not  
violate clearly established statutory or constitutional rights of which a reasonable person would

1 have known.” *White*, 137 S.Ct. at 551 (quoting *Mullenix v. Luna*, 136 S.Ct. at 308).). A case  
2 directly on point is not required, but “‘existing precedent must have placed the statutory or  
3 constitutional question beyond debate.’” *Id.* The court took occasion to reiterate that “‘clearly  
4 established law’ should not be defined ‘at a high level of generality.’” *Id.* at 552 (quoting  
5 *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). “[T]he clearly established law must be  
6 ‘particularized’ to the facts of the case.” *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640  
7 (1987)). “Otherwise, ‘[p]laintiffs would be able to convert the rule of qualified immunity ... into  
8 a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’”  
9 *Id.*

10 In *White*, the Supreme Court held that general statements of law concerning excessive  
11 force set forth in *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1  
12 (1985), and relied upon by the appellate court in denying qualified immunity, “d[id] not by  
13 themselves create clearly established law outside ‘an obvious case.’” *Id.* (quoting *Brosseau v.*  
14 *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2023  
15 (2014)). That being said, “general statements of the law are not inherently incapable of giving  
16 fair and clear warning to officers, ..., but in light of pre-existing law the unlawfulness must be  
17 apparent[.]” *Id.* (internal citations and quotation marks omitted).

18 The Supreme Court concluded that *White* was “not a case where it [wa]s obvious that  
19 there was a violation of clearly established law under *Garner* and *Graham*,” intimating that the  
20 case did not involve a “run-of-the-mill Fourth Amendment violation.” *Id.* Instead, the case  
21 presented a “unique set of circumstances” as it involved a police officer who arrived late to the  
22 scene of ongoing police activity and witnessed shots fired by one of many persons in a house  
23 surrounded by officers and then shot and killed an armed occupant of the house without giving a  
24 warning first. The Supreme Court noted that clearly established federal law did not “prohibit a  
25 reasonable officer who arrives late to an ongoing police action in circumstances like this from  
26 assuming that proper procedures, such as officer identification, have already been followed” or  
requires the officer “to second-guess the earlier steps already taken by his or her fellow officers.”

1 The Ninth Circuit very recently discussed qualified immunity, and specifically the clearly  
2 established law component of the defense, post-*White*, in *S.B. v. County of San Diego*, -- F.3d---,  
3 2017 WL 1959984 (9th Cir. May 12, 2017). *S.B.* also involved a Fourth Amendment excessive  
4 force claim. There the Ninth Circuit concluded, as the court has here, that taking the facts in the  
5 light most favorable to the plaintiff, the district court properly determined that a reasonable juror  
6 could find a constitutional violation. It then turned to the second prong of the qualified immunity  
7 analysis—the clearly established law prong. *Id.* at \* 5. The court reiterated that this inquiry  
8 “‘must be undertaken in light of the specific context of the case, not as a broad general  
9 proposition,’” and this is especially the case in the Fourth Amendment context, “where ‘[i]t is  
10 sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive  
11 force, will apply to the factual situation the officer confronts.” *Id.* (quoting *Mullenix*, 136 S.Ct. at  
12 308).

13 The Ninth Circuit went on to specifically note “the Supreme Court’s recent frustration”  
14 with the appellate courts, and the Ninth Circuit in particular, in defining clearly established law  
15 “at a high level of generality.” *Id.* (citing *City & County of San Francisco v. Sheehan*, 135 S.Ct.  
16 1765, 1775-76 (2015)). In *S.B.*, the Ninth Circuit stated that it “hear[d] the Supreme Court loud  
17 and clear,” indicating that to impose liability on the defendant it had to identify precedent as of  
18 the time of the conduct in question that put the defendant on notice that his conduct in the  
19 particular circumstances present violated the Constitution (in that case, constituted excessive  
20 force). *Id.* at \* 6. The Ninth Circuit described *White*’s clearly established law standard as  
21 “exacting.” *Id.* at \*7.

22 Neither the Supreme Court nor the Ninth Circuit has specifically discussed what level of  
23 factual similarity is required in the context of an inmate action asserting a retaliation claim,  
24 particularly post-*White*. Therefore, the court is left with little guidance other than the Supreme  
25 Court’s instruction that clearly established law should not be defined at a high level of  
26 generality, but that liability may still attach if pre-existing law makes the violation apparent.

Here, neither the parties nor the court is not aware of a case that is directly factually  
similar to the retaliation issues presented here; therefore, the court must decide whether existing

1 law nevertheless was sufficiently clear so as to put Defendants on notice that their conduct  
2 violated the Constitution.

3 It was well established at the time of the events giving rise to this action that prisoners  
4 had a First Amendment right to file prison grievances. *Rhodes v. Robinson*, 408 F.3d 559, 567  
5 (9th Cir. 2005) (citing *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003)). Without this “bedrock  
6 constitutional guarantee[ ], inmates would be left with no viable mechanism to remedy prison  
7 injustices.” *Id.* It was also clearly established that “purely retaliatory actions taken against a  
8 prisoner for having exercised [that right] necessarily undermine[s] th[at] protection[ ]” and “such  
9 actions violate the Constitution quite apart from any underlying misconduct they are designed to  
10 shield.” *Id.* (citing *Pratt v. Rowland*, 65 F.3d 802, 806 & n. 4 (9th Cir. 1995) (“[T]he prohibition  
11 against retaliatory punishment is ‘clearly established law’ in the Ninth Circuit, for qualified  
12 immunity purposes.”). *Rhodes* involved a prisoner who alleged that officers confiscated,  
13 withheld and destroyed his property, threatened to transfer him to another institution and  
14 assaulted him because he exercised his right to file grievances. *Id.* at 568. In addition, in *Rizzo v.*  
15 *Dawson*, 778 F.2d 527 (9th Cir. 1985), the Ninth Circuit clearly held that prison officials could  
16 not transfer an inmate to another prison in retaliation for exercising his First Amendment rights.

17 In *Rhodes*, which was decided in 2005, the Ninth Circuit specifically stated that “‘the  
18 prohibition against retaliatory punishment is clearly established law in the Ninth Circuit, for  
19 qualified immunity purposes.’” *Rhodes*, 408 F.3d at 569 (citing *Pratt*, 65 F.3d at 806).

20 The court must address whether this statement by the Ninth Circuit squares with the  
21 “exacting” clearly established law standard of *White*. The court finds that it does under these  
22 circumstances.

23 Defendants argue that *Rhodes* did not deal with an “organized, concerted effort of over a  
24 dozen inmates abusing the grievance procedure in an attempt to circumvent the petition  
25 prohibition” (ECF No. 131 at 2:21-23) and the conduct of charging these inmates with abuse of  
26 the grievance process (ECF No. 131 at 8:19-20). They contend that *Rhodes* did not address the  
“unique set of facts and circumstances” present here where “fifteen (15) inmates acted in  
lockstep to draft and submit hundreds of identical grievances.” (ECF No. 131 at 15-16.)

1 While mindful of the Supreme Court's admonition in *White*, reiterated by the Ninth  
2 Circuit in *S.B.*, the court does not find that it needs to define the clearly established law from  
3 *Rhodes* and *Rizzo* any more narrowly. Defendants' argument that the law was not clearly  
4 established relies on the court accepting Defendants' version of the facts (that Plaintiff and the  
5 other inmates filed a host of grievances with the intent to harass in order to get back at prison  
6 officials for flattening the pagan grounds). In analyzing qualified immunity, however, the court  
7 must take the facts in the light most favorable to Plaintiff. *See e.g. S.B. v. County of San Diego*, -  
8 -- F.3d. ---, 2017 WL 1959984, at \*6 (9th Cir. May 12, 2017).

9 Under Plaintiff's version of the facts, after the Pagan grounds were flattened he and other  
10 inmates filed a multitude of grievances concerning various issues they wanted to raise in a  
11 lawsuit and Plaintiff advised defendant Emmanuel that he did not intend to be vexatious, but was  
12 trying to exhaust his administrative remedies as AR 740 required him to do before he could file a  
13 lawsuit. In addition, under Plaintiff's version of the facts, Defendants ignored his justification for  
14 filing the grievances, and proceeded to punish him with disciplinary segregation and a transfer to  
15 HDSP.

16 Whether the incident involved Plaintiff filing twenty grievances, or Plaintiff and other  
17 inmates each filing twenty grievances, the court is of the opinion that Defendants were on notice  
18 that subjecting Plaintiff to disciplinary action and transfer for filing grievances in order to  
19 exhaust his administrative remedies (as he asserts here) violates the Constitution via *Rhodes and*  
20 *Rizzo*.

21 The court does not find this version of facts to be so unusual such that Defendants would  
22 not have realized their conduct could violate the Constitution under *Rhodes*. *See Hope v. Pelzer*,  
23 520 U.S. 730, 741 (2002) ("officials can be on notice that their conduct violates established law  
24 even in novel factual circumstances.").

25 Therefore, the court finds that viewing the facts in the light most favorable to Plaintiff,  
26 the contours of Plaintiff's right against retaliation were sufficiently clear so that reasonable  
persons in Defendants' positions would have understood that what they did violated the  
Constitution. As such, Defendants' renewed motion for summary judgment on qualified

1 immunity grounds should be denied as to the retaliation claim.

2 Insofar as the Free Exercise Clause, RLUIPA and Equal Protection claims are concerned,  
3 Defendants' motion generally states that there was no case prior to 2009 that would have put  
4 them on notice that their conduct violated Plaintiff's constitutional rights. (ECF No. 104 at 26,  
5 28, 29.) Plaintiff's response focuses only on the retaliation claim in the discussion of whether the  
6 law was clearly established. (ECF No. 129 at 30-34.) Defendants' reply brief similarly focuses  
7 only on the retaliation claim. (ECF No. 131 at 14-18.)

8 Since none of the parties specifically briefed the issue of whether the law was clearly  
9 established with respect to the Free Exercise Clause, RLUIPA or Equal Protection claims, the  
10 court will not take up the issue sua sponte. Defendants' motion should remain denied as to these  
11 claims because they did not establish there was no violation of these constitutional rights under  
12 the first prong of the qualified immunity analysis.

### 13 **III. RECOMMENDATION**

14 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **DENYING**  
15 Defendants' Renewed Motion for Summary Judgment Based on Qualified Immunity (ECF No.  
16 104).

17 The parties should be aware of the following:

18 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
19 this Report and Recommendation within fourteen days of receipt. These objections should be  
20 titled "Objections to Magistrate Judge's Report and Recommendation" and should be  
21 accompanied by points and authorities for consideration by the district judge.

22 2. That this Report and Recommendation is not an appealable order and that any notice of  
23 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
24 until entry of judgment by the district court.

25 DATED: May 19, 2017.

26   
WILLIAM G. COBB  
UNITED STATES MAGISTRATE JUDGE